91-341

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STEPHEN J. ROCHNA,

PETITIONER,

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LAWRENCE B. SMITH
3938 E. GRANT RD., #191
TUCSON, ARIZONA 85712
602/326-0283
COUNSEL FOR PETITIONER

AUGUST, 1991

QUESTIONS PRESENTED

1. Is it a violation of the Administrative Procedure Act (APA) for the Federal Aviation Administration (FAA) to interpret its charter to authorize it to order suspension and revocation of pilots' licenses strictly as a penalty for violation of air-safety rules when the statutory section relied upon says nothing of penalties or rules violations, yet fail either to publish its interpretation in the *Federal Register* or *Code of Federal Regulations,* or promulgate the policy through public notice and comment procedures?

2. Under the *Bell Aerospace* doctrine may the FAA impose license penalties on a case by case basis by adjudication before the National Transportation Safety Board, rather than create such a rule pursuant to APA rulemaking procedures?

* * * * *

TABLE OF CONTENTS

AUTHORITIES CITED

Cases:

Statutes:

Regulations:

Miscellaneous:

NO. _____

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PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Stephen J. Rochna respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered March 26, 1991, order denying rehearing entered April 12, 1991.[1]

OPINIONS BELOW

The opinion of the First Circuit is reported at 929 F.2d 13 (1st Cir. 1991), and reprinted in the appendix.

The Opinion and Order of the National Transportation Safety Board (NTSB), not reported, is reprinted in the appendix; as is the administrative law judge's (ALJ) decision it affirmed.

JURISDICTION

The Federal Aviation Administration

[1] Simultaneously filed with this is Bellows v. Federal Aviation Administration, No. 90-1336, slip op. (D.C. Cir., Mar. 29, 1991). Except for a single additional (but different) issue injected by the appeals court in each, the basic APA issues raised by petitioners are identical.

(FAA) initiated an enforcement action against petitioner under 49 U.S.C. app. § 1429(a) by serving him with a Notice of Proposed Certificate Action dated December 11, 1987, followed by an Order of Suspension dated March 14, 1988, which ordered a 90-day suspension of his Commercial Pilot Certificate (license) as punishment for alleged safety violations. Pursuant to section 1429(a), he appealed to the NTSB for a hearing de novo, which was held July 28 and 29, 1988, by the ALJ, who affirmed the suspension; the final Board order affirming some, but not all, of the charges, and reducing the suspension to 30 days, was entered August 24, 1990.

Mr. Rochna petitioned the Court of Appeals for the First Circuit for review under 49 U.S.C. § 1486. That court entered judgment and opinion affirming the NTSB order on March 26, 1991; an order denying petition for rehearing was entered April

12, 1991. An Order extending time for filing petition for writ of certiorari to August 25, 1991, was signed by Associate Justice D.H. Souter and entered June 20, 1991,.

Jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Statutes and regulations directly relevant to the issues (pertinent text in appendix) are:

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 702-706 (1982): §§ 551(4), 552(a)(1), 553, 558, 706.

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982): §§ 1429(a) & 1471(a)(1).

Federal Aviation Regulations, 14 C.F.R. Parts 1-199 (1986): § 13.19.

STATEMENT OF THE CASE

This case is essentially a call for the Court to exercise its powers of supervision over the court and administrative agencies below. Sup.Ct.R. 10.1(a). We respectfully urge it to grant certiorari and, as an alternative to considering the strictly legal issues raised itself, send the case back to the Court of Appeals, directing it to answer basic questions which should resolve the case there.

Mr. Rochna was charged by the FAA with taking an Instrument Flight Rules (IFR) flight carrying hazardous (radioactive) materials in a single-engine airplane when he lacked the following: (1) proper checkrides for both aircraft and IFR flights; (2) proper hazardous materials training; (3) required ground training by the airtaxi operator for whom he conducted the flight. The FAA ordered his license suspended for 90 days as a penalty.

Although the lack of proper checkrides

was found by the ALJ to have been established, this was so obviously not the case that FAA-Washington which handled Mr. Rochna's appeal to the full Board recommended those charges be dropped and the penalty reduced to 30 days.[2] It should be noted that Mr. Rochna disputed the claim he had carried hazardous materials; he had been instructed not to by the chief pilot, and there was no direct evidence that he did. He had also attended the required ground school and official company records so certified. He testified under oath that he had, and his presence at there was testified to by the company president. In effect, he was impeached by information obtained by the FAA in another matter involving the company, over which he had no control--but rebutted by official records--and by information obtained from him long

[2] The issue was really whether checkrides for another operator were transferrable. They were.

before he was ever charged and when the purpose and nature of what the agency was after was obviously not clear. These matters, however, are not directly relevant to the legal issues petitioner raises, the most basic of which is:

The only penalty ever mandated by Congress for airsafety violations is a civil fine. The agency's claim of authority for license penalties, however, arises from a strained interpretation of language in the Federal Aviation Act of 1958 that connects suspension and revocation of various agency certificates with the words "public interest." The agency contends it may suspend or revoke anytime it deems it to be in the public interest and, ergo, punishing pilots for safety violations, obviously, is *in* the public interest.

On its face, this claim is a "statement of general policy," and "an interpretation of general applicability formulated and

adopted by the agency." The Administrative Procedure Act (APA) requires both to be published in the *Federal Register*. Failure so to do is a bar to "adverse" action against the citizen. The FAA denies neither the above characterizations nor its failure to publish.

The license-penalty policy has the substantial impact that requires it to be adopted through APA public notice and comment procedures, failure of which voids it. The FAA denies neither that it is "substantive," nor its failure to so adopt.

The First Circuit, although no such contention was made by the FAA, made it clear that to an important extent its decision was based on the *Bell Aerospace* doctrine that, instead of by rulemaking, the FAA could create the policy and impose suspensions for violations by adjudication on a case-by-case basis. This was a misapplication of that principle. For this rea-

son alone, the case should be returned to the First Circuit.

REASONS FOR GRANTING THE WRIT

Exceptional importance In its 33 years the Federal Aviation Administration has suspended or revoked about 80,000 persons--pilots, mechanics and operators. Yet, as remarkable as it may seem, the agency has promulgated *no* rule, through public notice and comment, or otherwise, that pilot or mechanic can read in the *Code of Federal Regulations* which would warn him that one of the penalties for the violation of any safety rule is suspension or revocation of his FAA license. The agency has not even published in the *Federal Register* a policy statement to this effect. It never denies these stark facts, nor do appeals courts ever confront them. This is why this case presents a need for this Court to exercise its appellate supervisory powers.

In weighing the importance of petition-

er's case, we ask the Court to compare the basic APA issue he raises to the APA issue in a case for which it recently granted certiorari: *Air Transport Ass'n of America v. Dept. of Transp.*, 900 F.2d 369 (D.C. Cir.); *cert. granted*, 111 S.Ct. 669, 112 L.Ed.2d 662); *remanded*, to consider question of mootness, 111 S.Ct. 944, 112 L.Ed.-2d 1033 (1991). The issues raised here, we submit, are vastly more important than those raised in *Air Transport*. There, under a Congressional mandate to create an in-house administrative hearing program for civil penalty cases not exceeding $50,000 (a kind of traffic or justice-of-the-peace court), the FAA published in the *Federal Register* and *Code of Federal Regulations* a voluminous and complex set of rules to implement it. The agency, however, deliberately failed to use APA public notice and comment procedures. The Air Transport Association, which represents major air car-

riers, along with others, challenged their validity and was upheld. (The FAA then republished them using public notice and comment procedures. *See* 55 *Fed.Reg.* 27548 (1990)). The agency argued the rules were exempt from notice and comment requirements because under 5 U.S.C. § 553(b)(A) they were "rules of agency organization, procedure, or practice."

The perceived "harm" the government complained of was that agencies might in borderline cases have to bear the unnecessary burden of publishing a notice of their intention to adopt such rules, and allow public comment before so doing, or be uncertain whether they should. (Given the letter and spirit of the APA, it is anomalous that the government would contend that the public has no business participating in the creation of a scheme of *due process* procedures designed to implement an entire system of administrative justice.)

The official wrong that petitioner complains of, for himself and the next 80,000 citizens subjected to FAA license penalties, is that in no official United States Government publication is there any language that warns the citizen pilot he or she may be subjected to such a penalty for violating an airsafety rule. Like petitioner, two to three thousand persons every year have their licenses suspended or revoked, hundreds of professionals lose months of wages, often their right to earn a living.

A key element of this wrong is that it allows the agency to proceed *without ever having to make an official statement of whence comes it authority to impose such a penalty*. *See* 5 U.S.C. § 553(b)(2). It also deprives pilots of any opportunity, as "interested persons," to indicate the criteria they believe should be used to determine when a license penalty should be used

in lieu of a money fine.

Counsel for petitioner and *Bellows*, the companion case, has several times asked the Court to consider this extraordinary problem: e.g., see *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294 (D.C. Cir.), *cert. denied*, 486 U.S. 1057, 108 S.Ct. 2825, 100 L.Ed.2d 926 (1988); *Tearney v. National Transp. Safety Bd.*, 868 F.2d 1451 (5th Cir.), *cert. denied*, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989); *Go Air, Inc. v. National Transp. Safety Bd.*, slip op. (D.C. Cir., Mar. 7, 1988), *cert. denied*, 109 S.Ct. 223, 102 L.Ed.2d 214 1988).[3]

All petitioner seeks is to require the FAA to comply with the Administrative Pro-

[3] Because of these, the First Circuit accused counsel for petitioner of being "oblivious to the obvious" and of "foolish persistency." *Rochna*, *supra*, 929 F.2d at 16. Counsel might otherwise be chagrined by such chastisement but for the fact he is author of the only extant indepth history of FAA enforcement. *See Smith*, **FAA PUNITIVE CERTIFICATE SANCTIONS: THE EMPEROR WEARS NO CLOTHES; OR, HOW DO YOU PUNISH A PROPELLER?**, 14 Transp. L.J. 59-100 (1985). Evidently the court did not read it.

cedure Act. In considering the importance of this issue, we ask the Court, as background, to look at these facts:

1) Neither through Congressional hearings, nor APA rulemaking procedures, in the sixty-five years since the Federal Government started regulating aviation has the public ever participated in the creation of license penalties.[4]

2) The only times Congress has considered airsafety violation penalties (1926, 1938, 1958 and 1987) it has mandated that violators "shall be" subject to civil penalties.[5]

3) Until forced to by the *Air Transport* case, the FAA in three-plus decades had

[4] Creation of a "penalty" by any body other than Congress is unconstitutional, but we do not raise that issue here. *See* United States v. Eaton, 144 U.S. 677 (1892), and 5 U.S.C. § 558.

[5] *See* 49 U.S.C. § 1471(a)(1): "*Any* person who violates . . . *any* rule, regulation, or order . . . *shall be* subject to a civil penalty . . ." [Emphasis added] The FAA never explains this imperative.

never used APA notice and comment procedures to promulgate *any* enforcement rule.

I. License-penalty policy violates APA and bars the action.

A. Failure to publish interpretation of general applicability.

After reciting the alleged facts of the incident and regulations violated, the FAA Order provides:

> By reason of the foregoing, the Administrator has determined that **safety in air commerce of air transportation and the public interest require** the suspension of your Airman Certificate No. 26585798.
>
> NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by **Section 609(a) of the Federal Aviation Act of 1958**, as amended, that:
>
> (1) Any pilot certificate now held by you, including Airman Certificate No. 26585798, be and hereby is suspended. [Emphasis added]

Section 609(a), 49 U.S.C. app. 1429(a), however, says nothing of violations, rules or penalties; it speaks only of qualifications matters, reinspection of aircraft, reexamination of airmen. (a-70)

FAA use of its claimed 609 powers involves a dichotomy: suspension for lack of qualifications; punishment for safety violations. Its enforcement manual:

> (3) Suspension action is warranted in situations where a certificate holder resists reexamination or reinspection under Section 609 of the Federal Aviation Act, or the reexamination or reinspection is not satisfactorily accomplished within a reasonable length of time (see Chapter 8).
>
> (4) Suspension may be used for punitive purposes where the nature of the violation warrants it . . .

Compliance and Enforcement Program, FAA Order 2150.3, ¶ 205.b., at page 15 (1980) (Reprinted Oct. 1983). An earlier manual:

> Although the reexamination of certificated airmen and reinspection of certified aircraft . . . do not involve enforcement in the strict sense of "punishment of offenses," they are considered in this handbook because the objective and the procedures are identical with those applicable to enforcement matters.

Compliance and Enforcement, FAA Order 80-30.7A, ¶ 200 (1970) (Consol. Reprint 1977).

As section 609 contains no language

relevant to violations and penalties, the claim the Administrator may use license penalties, on its face, is "an interpretation of general applicability formulated and adopted by the agency," as well, of course, a "statement of general policy." *See* 5 U.S.C. § 552(a)(1)(D). In fact, in its brief before the First Circuit, the FAA *specifically* admitted this: "[T]he FAA action in this case was predicated on its interpretation of its authority under §609-(a) . . ." Brief for the Respondents at 27, *Rochna v. National Transp. Safety Bd.*, No. 90-1919, slip op. (1st Cir. Mar. 26, 1991) (emphasis added).

The APA requires that "Each agency . . . publish in the Federal Register for the guidance of the public -- . . . statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). And "Except to the extent that a person has

actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ." *Id.*

In posing this issue, petitioner assumes, *arguendo*, the agency has lawful authority to adopt the policy.

Petitioner has established the two conditions needed to require dismissal of his case: (1) the policy used against him is an interpretation of general applicability formulated and adopted by the FAA; (2) by default, the FAA admits it has never been published. The only official place in which reference to the license-penalty policy may be found is an agency handbook. The Court has squarely held that placing such a policy in an agency manual does not comply with the APA; for it to be enforceable, publication requirements of the APA must be met.

Morton v. Ruiz, 415 U.S. 199 (1974); *see also, Northern California Power Agency v. Morton*, 396 F.Supp. 1187, 1191 (D.D.C. 1975), *affirmed* 539 F.2d 243 (D.C. Cir. 1976) ("The statute clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby.").

B. Failure to promulgate through APA public notice and comment procedures

It is undisputed the FAA has no regulation that tells pilots their licenses may be suspended as a penalty for a safety violation. *See* 14 C.F.R. § 13.19. A pilot's license is a property right. *Pastrana v. United States*, 746 F.2d 1447 (11th Cir. 1984). Beyond argument, the license-penalty policy is a "rule" within the APA definition, 5 U.S.C. § 551(4), and a "substantive rule of general applicability" which must be "adopted as authorized by law." *See id.*

§§ 552(a)(1)(D) and 553(d). Section 553, was meant to provide an opportunity for public participation by "interested persons" in the rule making process when that process results in the promulgation of rules or regulations of substantial impact. *Pharmaceutical Mfrs. Assoc. v. Finch*, 307 F.Supp. 858 (D. Del. 1970).

"The purpose of requiring a statement of the basis and purpose is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's action." *Am. Standard, Inc. v. U.S.*, 602 F.2d 256, 269 (U.S.Ct. of Claims 1979). How can the public and the courts know what the legal basis is for a penalty that deprives citizens of the right to earn a living unless the FAA promulgates the policy through public notice and comment? On what basis does the FAA substitute that penalty, in its sole discretion, for a money fine?

Law and precedent require that the safety-violation case against Mr. Rochna be dismissed on two counts: failure to publish the section 609 interpretation; failure to promulgate the license-penalty policy through notice and comment. *See* 5 U.S.C. § 706.

II. *Bell Aerospace* doctrine not applicable to creation of a "penalty"

The First Circuit rested its decision, at least in part, on the exception to APA rulemaking requirements set forth in *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267 (1974), also adopted by the Fifth Circuit in *Tearney v. National Transp. Safety Bd.*, *supra*. It said:

> Even if we assume, favorably to petitioner, that the agency policy at issue is a rule or regulation and not simply a statement made in the course of an agency adjudication, see NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974), it still need not be promulgated or published. [929 F.2d at 15.]

Rochna, supra, slip op. at 6 (a-57). In *Tearney* the court stated: "The FAA has

broad discretion to proceed via formal rulemaking or on a case-by-case basis when it addresses safety concerns." 868 F.2d at 1453."

The position of neither the First nor Fifth Circuits is sustainable. In *Bell Aerospace*, the NLRB in an adjudicatory proceeding was interpreting whether or not "buyers" were the sort of "employees" intended by the labor laws who could organize a collective bargaining unit, rather than a part of management, who could not. Could that Board decision stand as a "rule," or did the NLRB have to invoke APA rulemaking procedures? 267 U.S. at 291-92. The Court held it did not.

First, the difference between *Bell Aerospace* and the instant case is vast. The NLRB was interpreting a basic term, "employees," already in its charter, to include a further kind of worker. Here, the FAA is not expanding a term like "penal-

ties" to include, in addition to a money fine, suspension of pilots' licenses, but creating an entire system of justice out of vague language about "public interest." If the agency can do that, then why have a lengthy and detailed Congressional charter, why not a one-page statute directing the Administrator to do whatever he deems to be in the public interest, and let it go at that? Moreover, the Court in *Bell Aerospace* clearly exempted penalties from the holding: "*Nor are fines or damages involved here.*" *Id.* at 296 (emphasis added).

Secondly, the FAA Administrator has no authority to adjudicate any kind of certificate case, 49 U.S.C. § 1429(a), and the NTSB cannot make rules because it is restricted to reviewing FAA orders. *Id.*

Thirdly, only the Administrator is authorized to make airsafety rules, and in so doing is mandated to follow the APA. 49 U.S.C. § 1348(c) & (d).

This case presents an important opportunity for the Court to clarify the *Bell Aerospace* doctrine lest it erode the APA beyond recognition. Use of that doctrine provides another reason why this case should be remanded, as we have asked for *Bellows*, the companion case.

III. Decision below flawed; case should be remanded with instructions

Some of the flaws We urge the Court to remand this case to the First Circuit, if for no other reason than the serious mistakes to be seen in its opinion. Like *Bellows*, the court below has addressed issues never raised by petitioner. And for the same reasons: the FAA wrote its brief in a manner to imply petitioner had.

The First Circuit states in its opinion: "This appeal arises on a single issue . . ." *Rochna, supra*, slip op. at 1 (a-51). And proceeds to misstate the APA issue because it leaves out the fact that petitioner was

complaining about FAA failure to publish or promulgate its *interpretation* of section 609 on which it based its authority to impose license penalties.

Later, stating that the case arose on a single issue, the court, after discussing the APA and cases, noted: "This [the APA] is the second issue raised by Rochna. The first, that of statutory authority, has long been determined . . ." *Id.* at 6 (a-58). Not only did the court confuse the number of issues it was dealing with, and the order in which they were presented, but this statement is utterly without foundation. *In no way did petitioner question FAA authority to impose license penalties.* As occurred in *Bellows*, the FAA wrote its brief to imply he had--to raise a strawman.

The questions We urge the Court to remand this case to the First Circuit, and instruct it to answer these questions:

1) Is the suspension by the FAA of a pilot's certificate for the violation of a safety regulation, when his qualifications are not at issue, a "penalty," as that term is commonly used?

2) Is such a penalty used by the FAA as an alternative penalty to that of a civil-money fine?

3) Is the FAA's claim of authority for punitive certificate suspensions based on an interpretation of the public interest language contained in section 609 of the Federal Aviation Act of 1958?

4) If so, and the interpretation has never been published in the *Federal Register*, on what basis would that not be a violation of 5 U.S.C. § 552(a)(1)?

5) Is the license-penalty policy "substantive" as the term is defined in the Administrative Procedure Act and, if so, and it has never been adopted through public notice and comment, on what basis would

that not be a violation of 5 U.S.C. § 553?

6) In what official United States Government publication may a member of the public find a statement that a pilot is subject to losing his license for the violation of a safety rule?

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

Lawrence B. Smith
Counsel for Petitioner

August 1991

APPENDIX

TABLE OF CONTENTS

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U.S. Department of Transportation
Federal Aviation Administration
New England Region
12 New England Executive Park
Burlington, Massachusetts 01803

Case No. 87NE610127

March 14, 1988

CERTIFIED - RETURN RECEIPT REQUESTED

To: Mr. Stephen J. Rochna
P.O. Box 162
North Hero, VT 05474

ORDER OF SUSPENSION

On December 11, 1987, you were advised by mail, and hand served on December 14, 1987, through a Notice of Proposed Certificate Action of the reasons why we proposed to suspend your Airman Certificate No. 26585798.

After consideration of all the evidence presently a part of this proceeding, it has been determined that you are in violation of the Federal Aviation Regulations hereinafter specified by reason of the following:

1. You are the holder of Airman Certifi-

cate No. 26585798 with Commercial Pilot privileges.

2. On June 22, 1987, you acted as pilot-in-command of civil aircraft N9268C, a Piper Arrow PA28R-201T, on a Cash Air, Inc., revenue flight from Lawrence, MA to JFK Airport, NY.

3. Said flight was conducted under IFR.

4. On said flight you carried hazardous material for E.I. Dupont DeNemours.

5. At the time of said flight you were not employed as a pilot by Cash Air, Inc.

6. At the time of said flight you had not received hazardous material training according to the Cash Air Company Training Manual.

7. At the time of said flight you had not completed Part 135 initial ground training under the Cash Air Company Training Manual.

8. At the time of said flight you had not had an Airman Competency/Proficiency Check (FAA Form 8410-3) for Part 135 operations

for Cash Air, Inc.

9. At the time of said flight you were not qualified to act as pilot in command in Part 135 operations for Cash Air, Inc.

[p. 2] By reason of the foregoing circumstances you violated the following Federal Aviation Regulations:

(a) Section 135.333 in that you performed assigned duties and responsibilities for the carriage of hazardous materials (as defined in 49 CFR 171.8) when, within the preceding 12 calendar months, you had not completed initial training in an appropriate training program established by the certificate holder.

(b) Section 135.343 in that you served as a crewmember in a Part 135 operation without having completed the appropriate initial phase of the training program appropriate to the type of operation in which you served since the beginning of the 12th calendar month before that service.

(c) Section 135.293(a) in that you served as pilot when, since the beginning of the 12th calendar month before that service, you had not passed a written or oral test given by the Administrator or an authorized check pilot on your knowledge in the required areas.

(d) Section 135.293(b) in that you served as a pilot in an aircraft when, since the beginning of the 12th calendar month before that service, you had not passed a flight check in the type of aircraft you flew.

(e) Section 135.299(a) in that you served as pilot-in-command of an flight when, since the beginning of the 12th calendar month before that service, you had not passed a competency check given by the Administrator or an authorized check pilot in the type of aircraft you flew.

(f) Section 135.297(a) in that you served as a pilot-in-command of an aircraft

under IFR when, since the beginning of the 6th calendar month before that service, you had not passed an instrument proficiency check under Part 135 administered by the Administrator or an authorized check pilot.

By reason of the foregoing, the Administrator has determined that safety in air commerce of air transportation and the public interest require the suspension of your Airman Certificate No. 26585798.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by Section 609(a) of the Federal Aviation Act of 1958, as amended, that:

(1) Any pilot certificate now held by you, including Airman Certificate No. 2658-5798, be and hereby is suspended.

(2) Said suspension be effective on April 2, 1988, and shall continue in effect until said certificate has been suspended for a period of ninety (90) days.

[p. 3] (3) Said certificate be surrendered

by mail or delivery to the Regional Counsel of the Federal Aviation Administration, New England Region, Room 311, New England Executive Park, Burlington, Massachusetts 018-03, on or before the effective date of this Order.

(4) In the event you fail to surrender your certificate on or before April 2, 1988, said suspension will become effective as of that date and shall continue in effect for a period of ninety (90) days.

(5) You may surrender your certificate prior to the specified date, in which event the period of suspension shall commence upon such surrender and continue in effect until ninety (90) days subsequent to the actual surrender thereof.

(6) Failure to surrender your certificate pursuant to the terms of this order may subject you to civil penalties up to $1,000 per day.

LAWRENCE C. SULLIVAN
Regional Counsel, ANE-7

By: /s/
Amy L. Corbett
General Attorney, ANE-7

APPEAL

You may appeal this by filing an original and four copies of your Appeal within twenty (20) days from the time of its service upon you to the National Transportation Safety Board, Office of the Administrative Law Judges, 800 Independence Avenue, S.W., Washington, D.C. 20594, (202-382-6770). A copy of your Notice of Appeal should be furnished to this office. Such appeal will stay the effectiveness of this Order. You are hereby advised that, if you appeal, a copy of this Order will be forwarded to the National Transportation Safety Board and in such event will be considered the Administrator's Complaint.

[p. 1] ISSUED: October 31, 1988

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

T. ALLAN MCARTOR, Administrator, Federal Aviation Administration, Complainant,	*	
v.	*	Docket SE-9155
STEPHEN J. ROCHNA, Respondent.	*	

Amy L. Corbett, Esquire, for Complainant.

Lawrence B. Smith, Esquire, for Respondent.

INITIAL DECISION AND ORDER

John E. Faulk. Administrative Law Judge:

This proceeding arises under the provisions of Section 609 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1429). It comes here on plea of Stephen J. Rochna (Respondent) seeking review of the Order of Suspension, which serves as the complaint, of the Federal Aviation Administration (FAA), suspending Respondent's airman certificate for a period of ninety (90) days.

In the complaint it is alleged that on

June 22, 1987, the Respondent acted as pilot-in-command of a Part 135 cargo flight transporting hazardous materials for Cash Air, Inc., under IFR conditions from Lawrence, Massachusetts to JFK Airport in New York, during which time he was neither an employee of, nor qualified to act as pilot-in-command of a Part 135 flight for Cash Air. Respondent's lack of qualification to conduct the Part 135 flight stems from,

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[p. 2] according to the complaint, his not having received hazardous materials training, not completing initial ground training and not having had an Airman Competency/-Proficiency check from Cash Air. As a result of these allegations, it is asserted that Respondent violated the following provisions of the Federal Aviation Regulations (FAR):

Section 135.333 in that he performed assigned duties and responsibilities for

the carriage of hazardous materials (as defined in 49 CFR 171.8) when, within the preceding 12 calendar months, he had not completed initial training in an appropriate training program established by the certificate holder.

Section 135.343 in that he served as a crewmember in a Part 135 operation without having completed the appropriate initial phase of the training program appropriate to the type of operation in which he served since the beginning of the 12th calendar month before that service.

Section 135.293(a) in that he served as pilot when, since the beginning of the 12th calendar month before that service, he had not passed a written or oral test given by the Administrator or an authorized check pilot on your knowledge in the required areas.

Section 135.293(b) in that he served as a pilot in an aircraft when, since the

beginning of the 12th calendar month before that service, he had not passed a competency check given by the Administrator or an authorized check pilot in that type of aircraft.

Section 135.299(a) in that he served as pilot-in-command of a flight when, since the beginning of the 12th calendar month before that service, he had not passed a flight check in the type of aircraft you flew.

Section 135.297(a) in that he served as a pilot-in-command of an aircraft under IFR when, since the beginning of the 6th calendar month before that service, he had not passed an instrument proficiency check under Part 135 administered by the Administrator or an authorized check pilot.

Hearing was held in Boston, Massachusetts on July 28 and 29, 1988. At its conclusion, the parties presented oral argument*/ The arguments,

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*/ Motion made by Respondent and denied at the outset of the hearing and subsequently reasserted during the course of the hearing has been reconsidered and is denied.

[p. 3] along with all evidence of record have been considered, although not necessarily discussed or specifically referred to hereafter.

THE EVIDENCE

Mr. Stephen Ferraro was subpoenaed by the Complainant to testify. Ferraro was employed by Cash Air from April to June 1987 as a Part 135 pilot primarily transporting cargo. On June 22, 1987, Ferraro made a flight for Cash Air involving the transportation of radioactive materials as shown on the bill of lading (R-2). As pilot-in-command of the flight, Ferraro was required to sign the bill of lading in order to, inter alia, make him aware that he was transporting hazardous materials. He signed pages 2 and 3 of the bill of lading but not page 1.

The shipper was New England Nuclear Products (NEN). The shipment arrived about 6 P.M. whereupon loading began of Ferraro's aircraft. It was known before the shipment arrived that an additional aircraft would be required to transport the cargo. The Respondent was there and was assigned to fly an Arrow parked in close proximity to Ferraro's aircraft. Ferraro got into his aircraft as the loading proceeded and Respondent stood on the ground by the aircraft door and assisted in loading the Navajo; handing the boxes to another employee inside the cabin of the Navajo. Ferraro could see the Respondent standing on the ground performing the loading by looking back to his left from the cockpit. Ferraro's aircraft was loaded with cartons marked radioactive (A-1) as indicated on the bill of lading (R-1, pp 2 and 3). The excess cargo was to be loaded in the Arrow which respondent was to fly. As soon as the Navajo was

loaded, Ferraro departed. As a result, Ferraro did not see Respondent loading his aircraft nor did he see the Respondent takeoff. However, Ferraro did hear Respondent on the radio frequency about

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[p. 4] twenty minutes later and did see Respondent at JFK shortly after he had landed. Ferraro had no doubt that Respondent did in fact make the flight as the Arrow had been positioned close to his aircraft while being loaded; Respondent was there for that purpose; he heard Respondent on the frequency while Ferraro and Respondent were both airborne and saw Respondent at JFK shortly after Respondent had landed.

Ferraro was not a voluntary witness, having been subpoenaed by the Complainant. While Ferraro's flight was made from Lawrence to JFK under IFR conditions, Ferraro was restricted to single pilot VFR operations only. Also, Ferraro was given very

little ground training by Cash Air. Ferraro has never been sanctioned by the FAA for the above violations of the FAR.

Mr. Earl C. Mallard is employed by the FAA as the Hazardous Materials Coordinator of the New England Region. His duties include ensuring compliance with the hazardous materials regulations, as well as monitoring the training of those who handle hazardous materials in the New England Region. Hazardous materials training is broken down into two segments. One has to do with identifying hazardous material labels by class as well as reporting procedures. A more in-depth training segment deals with the understanding of the various regulations, preparation of documents, loading and transporting procedures.

During the course of the investigation of this incident, Mallard contacted the manager of physical distribution for NEN, the shipper of the products involved. It

was learned by Mallard that NEN had a list of all of Cash Air's aircraft as to their type and size and that NEN made a determination that two of Cash air's aircraft were required for its cargo move-

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[p. 5] ment of June 22, 1987, from Lawrence to JFK and identified to Cash Air the specific aircraft required. NEN was billed and paid Cash Air for the use of the Navajo and Arrow. Upon delivery of the cargo to the carrier, the pilot is required to sign the bill of lading. Here, the Respondent signed page 1 of the bill of lading (R-2) and the pilot of the Navajo, Ferraro, signed pages 2 and 3 of the bill of lading (R-2). About half of the cargo on pages 2 and 3 of the bill of lading were non-hazardous materials while those signed for by Respondent were almost all hazardous materials classified as Yellow II and III. All of the hazardous materials cartons (A-1) were identical; all

having a radioactive label. A primary reason for the pilot's signature on the bill of lading is to make him aware that he is transporting hazardous materials.

Mr. Dennis M. Ouimette is employed by the FAA as an Aviation Safety Inspector and has extensive aviation experience; having many hours of flight and hold several ratings. Also, he has extensive experience in the conduct of a Part 135 operation having been so employed for a long period of time prior to his current employment with the FAA. On June 17, 1987, this witness testified that he made a routine inspection of Cash Air. He asked for and was provided flight and duty record of company pilots, including their training folders. Subsequently, on June 24 the witness became the principle [sic] operating inspector for the Company and two days later, on June 26, 1987, a full scale investigation by an FAA team was initiated as a result of a fatal

accident involving another aircraft of Cash Air. This was a more in-depth inspection. During the course of this inspection, as well as the previous one of June 17, 1987, Cash Air never produced any records pertaining to the Respondent although a request had been made for all pilot records. As to the pilot training program of the Company, the FAA had required the Company

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[p. 6] to advise the FAA when ground training was to occur so that the training could be observed. Twenty-two (22) hours of such training was required (A-5). Between April 10 and May 12, 1987, four letters were received from the Chief Pilot of the Company (A-6 through A-9) reflecting the ground training given and a list of the pilots receiving said training. Respondent's name was not included. Ouimette further testified that he had no evidence from the Company that Respondent had been employed or

had received any ground training. Nor was there any evidence that Cash Air gave the required notice of the training to the FAA.

Continuing his investigation of this incident, the witness contacted the Respondent in Chicago on July 7, 1987, by telephone. During the course of the telephone conversation, Respondent advised Ouimette that he had become employed by the Company on July 6, 1987, at which time he received a checkride. He stated that he never had operated an aircraft for the Company as pilot-in-command prior to this date. Also, Ouimette testified that Respondent stated he had sixteen (16) hours of pilot ground training but had not received any hazardous materials training. Respondent thought none was needed since the Chief Pilot had advised him that he would not be piloting aircraft carrying such materials. The witness further testified that after advising Respondent that the FAA was aware that Respon-

dent had made the flight of June 22, 1987, Respondent then stated that he did make the flight but that he was not paid for this flight and that he had no idea what the cargo was, or whether it was a Part 91 or 135 flight. Respondent also stated, according to the witness, that he had flown in a separate aircraft in conjunction with Ferraro. The purpose of his [Respondent's] flight was to handle the overflow cargo as the shipment would not fit into one aircraft. Ouimette made a record of his telephone conversation (A-10).

[p. 7] As a result of the investigation into the fatal crash of June 24, 1987, the witness testified that since some of Cash Air's pilots lived in outlying areas, a questionaire was sent to these pilots, including Respondent. In a written response to the questionaire (A-11) dated July 1, 1987, the Respondent indicated he had rece-

ived from the Chief Pilot of the Company ten (10) hours of ground training; had checked the question as to hazardous materials training as "N/A" and the same response was made to recurrent hazardous materials training; "N/A" was also the response to whether Respondent had had an initial flight check under Part 135; and Respondent indicated he began his employment with Cash Air on July 5, 1987. Ouimette further testified that his investigation revealed none of the Cash Air pilots had received full hazardous materials training.

Ouimette also testified that each Part 135 pilot must have a flight proficiency check given by the company employing the pilot. The record of such flight is recorded on FAA Form 8410-3. Respondent did not have a current 8410-3 for Cash Air. However, Respondent had been issued two separate 8410-3's for another Part 135 carrier, New England Flyers. One form was dated

September 27, 1986, (R-7) and the other, March 23, 1987, (R-8). Except for the expiration of the six months IFR proficiency requirement as shown in R-7; had the June 22, 1987, flight been made for New England Flyers, Respondent would have met the requirements of Section 135.293(a) and (b); 135.299(a) and 135.297(a). However, Ouimette further testified that inasmuch as Respondent had not received the appropriate initial training from Cash Air he was not qualified to make the Part 135 flight of June 22, 1987. Moreover, testified the witness, while a 8410-3 would be valid for one carrier, the same 8410-3 would not be valid for

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[p. 8] another carrier. There is an FAA policy which states that before an 8410-3 can be accepted by the new carrier, documentation must flow between the new carrier and the FAA requesting approval by the new

carrier and being granted such by the FAA. Ouimette acknowledged that a pilot would not be aware of such a policy and thus cannot be held accountable (T-222); even though such was well known and recognized in the industry as a standard practice. The witness also acknowledged that this policy is not stated in the Operations Inspectors Handbook for Part 135 operations, No. 8430 ID. Also, with respect to said handbook (8430 ID) Ouimette acknowledged that a sub-paragraph "f" Free-Lance Pilots, (R-6) permits the use of 8410-3 by another carrier under certain conditions listed therein and makes no mention of the FAA policy of additional documentation.

Mr. Ronald Crete was called to testify on behalf of the Respondent. At the time of the incident, June 22, 1987, Crete was owner and President of Cash Air which began operations as a Part 135 carrier in May of 1986, and ceased operations in July of

1987, as a result of an emergency order of revocation. Crete testified that he had, in conjunction with his Chief Pilot, prepared a hazardous materials training program for his Company which was contained in Cash Air's operations manual. The operations manual submitted to the FAA was approved except for that portion dealing with hazardous materials. Nonetheless Cash Air pilots received such training. Recognition training is required by an FAR and need not be part of the manual. Crete testified he would only accept hazardous materials for transporting if they had a transportation index of fifty (50) or less. Regarding the flight of June 22, 1987, Crete asserted he became aware of

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[p. 9] the flight about an hour before it occurred, having received a telephone call from his dispatcher. Crete stated that he was asked by the dispatcher if the Respon-

dent could be used to fly the Arrow as the second section. Crete approved even though his operations specifications permitted only the use of multi-engine aircraft (A-15). He assumed the dispatcher would be flying the Navajo and was not advised that Ferraro would be doing so. Also, Crete stated he was unaware of the nature of the cargo. Crete testified he approved of the Respondent flying the Arrow as he had the appropriate FAA certificates; had the necessary 8410-3 forms from a previous carrier (R-7 and R-8); and had received ground training from Cash Air in May 1987, (R-13). Crete also testified he had reviewed FAA Inspectors Handbook, 8430 ID and found Respondent qualified thereunder (R-9 through R-12). On June 22, 1987, Respondent was not employed by Cash Air but was considered to be a free-lance pilot and as such, had no obligation to take this flight. Although Respondent had been interviewed in either

April or May; had taken his ground school training with Cash Air and had flown with Cash Air pilots in the right seat to observe Company operations, he was not employed until July 6, 1987.

Crete also testified that he was aware that the FAA required notice of his training sessions and they had been so advised by telephone and by letter. However, no one from the FAA showed for the April and May sessions. Crete stated he did not have copies of the letters sent to the FAA as they are with his former Chief Pilot who is now in Alabama. The former Chief Pilot had written the letters and made the phone calls to the FAA. Also, Crete testified that the FAA did not ask for Respondent's records.

The Respondent holds a Commercial Pilot certificate with instrument and multi-engine privileges. He testified that prior to his employment with

[p. 10] Cash Air, he was employed by a Part 135 cargo operator. Also he worked part-time towing banners. At New England Flyers, the Respondent testified he had received hazardous materials handling training. Sometime in March of 1987, Respondent interviewed with the owner of Cash Air, Mr. Crete concerning employment. He was asked by Cash Air to take ground training beginning in May 1987, totaling about twenty-eight (28) hours (R-13). According to Respondent's testimony, the Chief Pilot Mr. Roberts, advised him that he had completed the required ground training for Cash Air. It was Respondent's understanding that this training, coupled with the 8410-3's he held from New England Flyers, made him qualified for single engine Part 135 operations for Cash Air (R-8).

Respondent testified he had been confused about the questions asked by the FAA

in its questionaire (A-11) which he had answered on July 1, 1987. In answering the questionaire, Respondent had indicated he began his training with Cash Air on July 5, 1987, while R-13 indicates he had completed twenty-eight (28) hours in May of 1987. Respondent's rationale for this inconsistency was that he began flight training in the right seat. And, the discrepancy between the ten (10) hours of training shown on the FAA questionaire dated July 1, 1987, and the twenty-eight (28) hours shown on R-13, is explained as a misunderstanding on the part of the Respondent. His training was about ten (10) hours a day and he responded to the question about initial training as the first day of training, not the total amount of training. As to the dissimilarity between the amount of hours stated over the telephone to Ouimette (sixteen hours) and that shown on R-13, Respondent testified he had been awakened by Ouimet-

te's call after being asleep only a few hours and after a long day of duty and he does not remember much about the conversation.

[p. 11] Respondent further testified that he did make the flight of June 22, 1987, as alleged in paragraphs 2 and 3 of the complaint. He was still employed by New England Flyers at the time. Respondent testified he was called by Cash Air to fly as a backup pilot for a shipment from Lawrence to JFK. He arrived at the Cash Air facility between 6:00 and 7:00 P.M. The Navajo was to be flown by Ferraro and Respondent was to fly the Arrow. The description of the unloading of the shipment from the truck into the Navajo is generally consistent with the testimony of Ferraro. However, Respondent further testified that when the Navajo was loaded to a point, he began carrying cartons over to the Arrow which

was parked behind the Navajo and slightly to its left. (R-16) The Arrow would carry about a fourth to a third of the bulk that could be handled by the Navajo. Respondent testified that he personally loaded the Arrow, making several trips from the truck to the Arrow carrying a number of cartons about one cubic foot in size. Approximately half of the cartons were not labeled or marked as hazardous materials. Inasmuch as the Chief Pilot had told him he had not received hazardous materials training at Cash Air, he would not be handling such materials. Thus, he testified he only picked out the cartons that were not labeled as hazardous materials and loaded only those into the Arrow. Respondent's recollection was equivocal as to why he signed page 1 of the bill of lading (R-2), which reflected that he had signed for cartons labeled as hazardous materials (A-2).

DISCUSSIONS AND CONCLUSIONS

There is no question that the Respondent did on June 22, 1987, act as pilot-in-command of a singled engine aircraft on a Part 135 flight for Cash Air from Lawrence to JFK under IFR conditions. The evidence so reveals

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[p. 12] and the Respondent so concedes. At issue is whether Respondent was qualified to do so under the FAR. To begin with, there is no question that Cash Air's Operations Specification did not permit Part 135 operations in single engine aircraft (A-15). Thus, Respondent could not have lawfully performed said flight in the Arrow. But turning to the specifics of the complaint, it is alleged, inter alia, that Respondent in making the flight in questions violated 135.293(a) and (b); 135.-297(a) and 135.299(a) for the reasons stated in the complaint (supra, page 2). However, Respondent contends that he met the

requirements of these FAR in that he had passed a written or oral test given by an authorized check pilot. And, the evidence does disclose that Respondent had been issued FAA Forms 8410-3 reflecting such qualification but for a carrier other that Cash Air. It is Respondent's and his supporting witness' contention that such is valid for Respondent's June 22 flight for Cash Air. To the contrary, the Complainant's witness contends there is an FAA policy to the effect that before the 8410-3 can be accepted it must be approved by the FAA. While this policy may be well understood by the industry in general, Ouimette stated that an individual pilot could not be held accountable for such. Notwithstanding the inspector's concession, the specific regulations are worded in such a fashion as to limit the applicability of the 8410-3 to the operations of the carrier for whom it was issued. For example, quoting in

pertinent part from Section 135.293(a), the following language is found:

> No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test given by the Administrator or an authorized check pilot on that pilot's knowledge in the following areas... (Emphasis added).

While Sections 135.297(a) and 135.299(a), deal with other requirements, all

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[p. 13] have the same limiting language, "that service". Thus, the requirement in all three aforementioned regulations is that "...before that service..." can be initiated by the new carrier or the pilot, the demands of these sections must be made [sic]. No doubt, this is the basis for the Administrator's policy which Ouimette referred to. Inasmuch as the Respondent made the June 22 flight without having met the requirements for Cash Air, it is found that Respondent violated Section 135.293(a) and

(b); 135.297(a) and 1235.299(a) of the FAR as charged in the Complaint.

Turning to the allegation that Respondent violated Section 135.343 of the FAR, the evidence is in conflict. Respondent and his supporting witness, Crete, testified that Respondent had completed his initial training program as required by Section 135.343. In support thereof R-13 was received which purports to be Respondent's training record. This exhibit indicates that Respondent received the subject training on May 9, 10 and 11 of 1987, totaling twenty-eight (28) hours. Crete testified that he saw Respondent at these sessions and that his formed Chief Pilot had advised him that Respondent had completed the training. Respondent also testified to the same effect. However, in a Cash Air internal memorandum dated May 12, 1987, from the formed Chief Pilot to Crete (A-8), Respondent's name is not listed as one of the

pilots having successfully completed the required training. Also damaging to Respondent is his statement made to Inspector Ouimette on July 17, 1987, that he had only sixteen (16) hours of initial training. While the Respondent and Crete attempted to explain away the inconsistencies, the explanations are found to be

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[p. 14] incredulous and therefore, all credibility findings are made against the Respondent and his supporting witness. As a result, Respondent is found to have violated Section 135.343 of the FAR.

Finally, Respondent is charged with a violation of Section 135.333 of the FAR. There is no creditable evidence in the record to show that Respondent was given hazardous materials training by Cash Air. Moreover, it is Respondent's testimony that he was told by Cash Air's Chief Pilot that he had not had such training and therefore

would not be transporting hazardous materials; and because he did not have the required training, he loaded only cartons into the Arrow that did not have labels indication they were hazardous materials. it is clear from Respondent's own testimony (T-434) that he did not have the training required by Section 135.333. But, Respondent's defense is that even thought he did not have the training, none was required because he transported only non-hazardous materials. This testimony is refuted by Respondent's signature on page 1 of the bill of lading which reflects that almost all of the cartons he accepted for transportation were labeled as hazardous materials (R-2, page 1). Respondent's explanation as to why his signature appeared on page 1 of the bill of lading is found to be vague and obscure, therefore not credible. As a result, it is found that Respondent did transport hazardous materials on June

22, 1987, without having the required training in violation of Section 135.333 of the FAR.

SANCTION

The ninety (90) day suspension sought by the Administrator for the violations found to have occurred is consistent with Board precedent and will be imposed as provide for in the Order herein.

[p. 15] IT IS THEREFORE, ADJUDGED AND ORDERED THAT:

1. The Administrator's Order of Suspension be, and the same is hereby affirmed as issued.

2. That the Respondent's Commercial Pilot Certificate with attached ratings and limitations be, and the same is hereby suspended effective ten (10) days from this date for a period of ninety (90) days.

3. The Respondent shall surrender his certificate either by personal delivery to

an authorized representative of the Administrator or by placing the certificate in the United States mail, postage prepaid, and properly addressed to an authorized representative of the Administrator.

4. If the Respondent surrenders his certificate on or before the effective date of this Order, the period of suspension shall commence to run as of the actual date of surrender. However, if the Respondent does not surrender his certificate to the Administrator within the time provided, the period of suspension shall continue in force and effect until the certificate has been physically surrendered to the Administrator and has been in the possession of the Administrator for the period specified herein.

Entered this 31st day of October, 1988, at Melbourne, Florida.

/s/
JOHN E. FAULK
Administrative Law Judge

SERVED: August 24, 1990
NTSB Order No. EA-3184

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of August, 1990

JAMES B. BUSEY, Administrator, Federal Aviation Administration, Complainant, v. STEPHEN J. ROCHNA, Respondent.	Docket SE-9155

OPINION AND ORDER

Respondent has appealed from a written initial decision that Administrative Law Judge John E. Faulk issued on October 31, 1988.1/ An evidentiary hearing was held in this matter on July 28 and 29, 1988. The law judge affirmed an order of the Administrator suspending respondent's airman certificate for 90 days, finding that the evi-

dence of record established the violations alleged. On February 28, 1989, while this appeal was pending, the Administrator withdrew three of the six allegations of regulatory violations that the law judge affirmed.

1/ A copy of the written decision is attached.

[p. 2] After the withdrawal, the Administrator's order, which served as the complaint herein read in pertinent part as follows:

1. You are the holder of Airman Certificate No. 26585798 with Commercial Pilot privileges.

2. On June 22, 1987, you acted as pilot-in-command of civil aircraft N9268C, a Piper Arrow PA28R-201T, on a Cash Air, Inc., revenue flight from Lawrence, MA to JFK Airport, NY.

3. Said flight was conducted under IFR.

4. On said flight you carried hazardous

material for E.I. Dupont DeNemours.

5. At the time of said flight you were not employed as a pilot by Cash Air, Inc.

6. At the time of said flight you had not received hazardous material training according to the Cash Air Company Training Manual.

7. At the time of said flight you had not completed part 135 initial ground training under the Cash Air Company Training Manual.

By reason of the foregoing circumstances, you violated the following Federal Aviation Regulations [FAR]:

(a) Section 135.333 in that you performed assigned duties and responsibilities for the carriage of hazardous materials (as defined in 49 CFR 171.8) when, within the preceding 12 calendar months, you had not completed initial training in an appropriate training program established by the certificate holder.

(b) Section 135.343 in that you served as a crewmember in a Part 135 operation without having completed the appropriate initial phase of the training program appropriate to the type of operation in which you served since the beginning of the 12th calendar month before that service.

(c) Section 135.293(a) in that you served as pilot when, since the beginning of the 12th calendar month before that service, you had not passed a written or oral test given by the Administrator or an authorized check pilot on your knowledge in the required areas.

[p. 3] Respondent, by counsel, has filed a brief in support of his appeal, contending that: 1) the law judge erred when he found that respondent carried hazardous materials, and the evidence of record fails to so establish, by the requisite preponderance; 2) the evidence of record does not

support the law judge's finding that respondent had received no ground training from the air carrier (Cash Air); and 3) there is no regulatory requirement that a pilot who operates under an air carrier's Part 135 operating certificate shall be an employee of that company. Respondent also raises a number of challenges that should be directed to the Courts, such as, whether the cited FAR sections were legally promulgated.2/ These are matters that the Board cannot entertain. See Go Leasing, Inc. v. NTSB, 800 F.2d 1514 (9th Cir. 1986) and Air Transport Assn. v. Sec'y, DOT, 900 F.2d 369 (D.C.Cir. 1990). Last, respondent questions the severity of the sanction.3/

The Administrator has filed a brief in reply. He requests that the Board impose a 30-day suspension of respondent's airman certificate for the violations that were not withdrawn. In response to the issues raised by respondent, the Administrator,

among other things, contends that a preponderance of the evidence of record supports the law judge's

2/ The Board provides a forum for challenging the validity of any order of the Administrator amending, modifying, suspending, or revoking a certificate issued under Title 6 of the Federal Aviation Act. The Board is not empowered to review the Administrator's authority to issue such an order.
3/ Respondent's views on sanction are predicated on the 90 day suspension sustained by the law judge.

[p. 4] findings that respondent violated sections 135.333, 135.343, and 135.293-(a).4/

Upon consideration of the briefs, and of the entire record in this proceeding, the Board determines that safety in air commerce or air transportation and the public interest require that the charges not withdrawn by the Administrator be affirmed and that a 30-day suspension be imposed. We adopt the law judge's findings and conclusions in regard to those three allega-

tions of regulatory violations.

Respondent raises two allegations of error that pertain to credibility determinations that the law judge made. The law judge determined, after hearing the testimony and reviewing the documentary evidence, that respondent did carry hazardous (radicactive) materials when he flew for Cash Air on June 22, 1987. The Boards finds testimony in the record and other documentary evidence sufficient to support that determination. To the extent that the determination was based on credibility, the law judge gave weight to the fact that respondent's signature appeared on the bill of lading indicating his acceptance of part of the shipment that was carried for New England Nuclear (NEN) containing radioactive materials. Respondent's brief provides no persuasive reason for disturbing the law judge's evaluation of the evidence.

Similarly, the law judge made a credibi-

lity determination that respondent had not complete Cash Air's initial training program,

4/ The regulations found to have been violated are set forth in full in the Appendix to the opinion.

[p. 5] rejecting respondent's testimony and other evidence purporting to show that he had completed a total of 28 hours of such training. The law judge found inconsistencies in the explanation provided and he ruled that "all credibility findings are made against respondent and his supporting witness." (I.D. at 14). Again, we find no evidence in the record that would cause the Board to overturn the law judge's resolution.5/

In sum, the Board finds that there is evidence in the record sufficient to support the law judge's findings that respondent carried hazardous materials on the flight he conducted June 22, 1987, when he

had not had training in the carriage of hazardous materials (section 135.333), that respondent operated that flight when he had not completed either the air carrier's initial training program (section 135.243) or the testing required by FAR Section 135.-293(a). We think, further, that the 30 day suspension recommended by the Administrator is appropriate and should be imposed.

5/ Respondent's argument that the record supports a finding that he received some ground training is unavailing. Section 135.343 requires that any person serving as a crewmember shall have completed initial training. Attendance at some initial training sessions does not fulfill that requirement. In any event, the law judge rejected the testimony and exhibit that were offered to prove that respondent had received some training and respondent has not shown error in these assessments.

[p. 6] ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order, as amended to delete the three regulatory violations identified hereinbefore, and as amended to impose a 30-day suspension of respondent's

airman pilot certificate, is affirmed;

3. The initial decision to the extent that it finds established the regulatory violations not subsequently withdrawn by the Administrator, is affirmed (as modified in respect to sanction); and

4. The 30-day suspension of respondent's airman pilot certificate shall begin 30 days after service of this order.6/

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER and BURNETT, Members of the Board, concurred in the above opinion and order.

6/ For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR Section 61.19(f).

[Appendix not included; contains only FARs which may be found in the *Code of Federal Regulations*: 14 CFR §§ 135.333, 135.343, 135.293 (1986).]

[p. 1] UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1919

STEPHEN J. ROCHNA
Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD
AND JAMES B. BUSEY, ADMINISTRATOR, FEDERAL
AVIATION ADMINISTRATION,
Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL TRANSPORTATION SAFETY BOARD/FAA

Before

Breyer, Chief Judge,
Bownes, Senior Circuit Judge
and Selya, Circuit Judge

Lawrence B. Smith for petitioner.
Joseph A. Conte, Federal Aviation Administration, for respondents.

March 26, 1991

[p. 1] BOWNES, Senior Circuit Judge. This appeal arises on a single issue: whether the Federal Aviation Administration's ("FAA's") disinclination to promulgate through

public notice and comment or publish in the Code of Federal Regulations ("CFR") a rule authorizing the suspension of an airman certificate is a violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 552(a)(1) and 553. We reject the appeal.

I. BACKGROUND

On March 14, 1988, the FAA Administrator suspended Stephen J. Rochna's airman certificate for ninety days under the provisions of Section 609 of the Federal Aviation Act of 1958, as amended in 49 U.S.C. § 1429 (1982).[1] The Administrator alleged that on June 22, 1987, Rochna acted as pilot-in-command of a cargo flight transporting hazardous

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1. 49 U.S.C. § 1429(a) reads in relevant part: If [sic] . . . he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate . . . . Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transporta-

tion shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificates should not be amended, modified, suspended, or revoked.

[p. 3] materials for Cash Air, Inc. under IFR (Instrument Flight Rules) weather conditions. At the time of the flight from Lawrence, Massachusetts to JFK Airport in New York, Rochna was not yet an employee of Cash Air, nor was he qualified to act as pilot-in-command of its Part 135[2] flight. He was charged with not having received hazardous materials training, not completing initial ground training and not having had an Airman Competency/Proficiency check by Cash Air. These charges resulted in six alleged violations of the Federal Aviation Regulations ("FARs")[3] and an order of suspension for ninety days.

After a National Transportation Safety

Board ("NTSB") hearing in Boston on July 28 and 29, 1988, the Administrative Law Judge ("ALJ") found against Rochna on issues of credibility and upheld his ninety-day certificate suspension for all six FAR violations. Further, he concluded that the suspension

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2. "Part 135" as found in 14 CFR § 135 (1990) [sic] covers aviation regulations for air taxi operators and commercial operators. Regulations from 14 CFR §§ 135.291 to 135.303 refer to crewmember testing requirements while regulations §§ 135.321 to 135.353 refer to airman training.

3. Rochna was originally charged with and found guilty of violations of the following six sections of the FAR: § 135.333 (carriage of hazardous material without appropriate training); § 135.343 (Part 135 crewmember without initial training); § 135.293(a) (pilot without passing written/oral test in past twelve months); § 135.293(b) (pilot without passing competency check in past twelve months); § 135.299(a) (pilot-in-command without passing flight check in particular aircraft); § 135.297(a) (pilot-in-command without passing instrument proficiency check under Part 135).

[p. 4] "sought by the Administrator [FAA] for the violations found to have occurred is consistent with Board [NTSB] precedent .

. . ." Administrator v. Rochna, NTSB Order, Docket No. SE-9155 (Oct. 31, 1988).

On February 28, 1989, the FAA Administrator withdrew allegations of three of Rochna's six FAR violations: those under §§ 135.293(b), 135.297(a) and 135.299(a). Upon appeal, the NTSB upheld the judge's credibility determination on the three remaining violations. It then changed Rochna's suspension from ninety to thirty days. Administrator v. Rochna, NTSB Order EA-3184, Docket No. SE-9155 (August 24, 1990). Rochna now appeals this thirty-day certificate suspension on the basis of purported FAA failure to promulgate or publish rules for such action. The NTSB concluded that it should not address this issue.

II. APPLICABLE STATUTES AND CASE LAW

Under the Federal Aviation Act, the FAA Administrator holds responsibility for flight safety in civil air commerce. 49 U.S.C. § 1421(a). Congress has authorized

various enforcement modes including FAA § 609 emergency certificate suspension action under 49 U.S.C. § 1429(a)22 [sic] and FAA § 901 civil penalties under 49 U.S.C. § 1471 (a).[4] See Go Leasing,

4. Rochna's wide-ranging brief invokes comparisons between certificate suspension and civil penalties. The latter require money fines which are irrelevant here, appellant has no

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[p. 5] Inc. v. National Transp. Safety Bd., 800 F.2d 1514, 1517-18 (9th Cir. 1986).

Pangburn v. Civil Aeronautics Bd., 311 F.2d 349 (1st Cir. 1962), one of the seminal aviation certificate suspension cases, upheld the right of the FAA under its § 609 powers "to impose a suspension as 'sanction' against specific conduct or because of its 'deterrence' value -- either to the subject offender or to others similarly situated." Id. at 354. Current cases likewise hold that there is a "clear statutory basis for the FAA's policy of suspending

airman certificates as a sanction for violation of FARs." Hill v. national Transp. Safety Bd., 886 F.2d 1275, 1281 (10th Cir. 1989).

This regulatory policy has endured essentially unchanged since the Civil Aeronautics Act of 1938 through its legislative reenactment as the Federal Aviation Act in 1958 to the present. See Pangburn, supra, at 354 (citing Hard v. Civil Aeronautics Bd., 248 F.2d 761 (7th Cir. 1957) (upholding suspension as deterrent), cert. denied, 355 U.S. 870 (1957).

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standing to argue civil penalties because none have been imposed. Likewise, petitioner's reliance upon Air Transport Ass'n of America v. Department of Transp., 900 F.2d 369 (D.C. Cir. 1990), is misplaced. Air Transport is inapposite to the instant case because the former involves civil penalties for air safety violations. The Court vacated the judgment in Air Transport and remanded to consider the question of mootness. Department of Transp. v. Air Transp. Ass'n, 59 U.S.L.W. 3561 (U.S. Feb. 19, 1991) (No. 90-605).

[p. 6] A recent certificate suspension

case, Komjathy v. National Transp. Safety Bd., 832 F.2d 1294 (D.C. Cir. 1987), provides an illustrative parallel to the rule-making issue in Rochna's case. In Komjathy, the plaintiff's challenge to an unpromulgated regulation implementing 49 U.S.C. § 1429(a) was deemed to be "utterly without basis." The court concluded that the regulation did "no more than repeat, virtually verbatim, the statutory grant of authority in 49 App. U.S.C. § 1429(a) for the ordering of such suspensions." Id. at 1296-97. Like Rochna, Komjathy was neither surprised nor injured by his certificate suspension. The virtual "reprinting of the statutory language," in the regulation could not "have affected Komjathy's rights and interests." Id.

Even if we assume, favorably to petitioner, that the agency policy at issue is a rule or regulation and not simply a statement made in the course of an agency adjud-

ication, see NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974), it still need not be promulgated or published. It depends upon the statute, 49 U.S.C. § 1429(a), for its substantive meaning and is not in itself substantive. Hence, it is not subject to the rule-making procedures outlined in 5 U.S.C. § 553(b)(3)(A). See Southern Cal. Aerial Advertisers' Assn' v. Federal Aviation Admin., 881 F.2d 672, 677 (9th Cir. 1989). This is the second issue raised by Rochna. The first, that of statutory authority, has long been predetermined by the premier First

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[p. 7] Circuit certificate suspension case upholding such an agency action nearly thirty years ago -- Pangburn v. Civil Aeronautics Bd., 311 F.2d 349 (1st Cir. 1962). the second issue, the need to apply the rule-making procedures of the APA, 5 U.S.C. §§ 552(a)(1) and 553, in airman certificate

suspension cases has, since Pangburn, consistently been answered in the negative across the circuits. See, e.g., Southern Calif. Aerial Advertisers' Ass'n, 881 F.2d at 677; Tearney v. National Transp. Safety Bd. 868 F.2d 1451, 1454 (5th Cir. 1989); Capuano v. National Transp. Safety Bd., 843 F.2d 56, 58 (1st Cir. 1988); Komjathy, 832 F.2d at 1296-97; Roach v. National Transp. Safety Bd., 804 F.2d 1147, 1155 (10th Cir. 1986); Go Leasing, 800 F.2d at 1522, 1526; Cobb v. national Transp. Safety Bd., 572 ?F.2d 202, 204 (9th Cir. 1977).

In Capuano, supra, we rejected a challenge to the failure to publish in the Federal Register an enforcement manual informing FAA employees that "[s]uspension may be used for punitive purposes when the nature of the violation warrant . . . ." Id. at 57. Aligning with the other courts that had considered the issue, we held that publication in the Federal Register under 5

U.S.C. § 552(a)(1) was not required. Id. at 58. Although the challenge here is cast in somewhat different terms, both the rationale and the holding of Capuano control this case.

Rochna cannot credibly complain of lack of due process.

[p. 8] He was charged with six specific violations of the FARs. The statute authorizes suspension of an airman certificate if the Secretary determines that "safety in air commerce or air transportation and the public interest [so] requires . . . ." 49 U.S.C. § 1429(a). Prior to such suspension, the statute provides for notice of the charges, an opportunity to answer them and a hearing. Id. Rochna was afforded all of these procedural safeguards. We fail to see how publishing a rule restating the statute would affect Rochna, pilots in general or the public.

We must also note that in Tearney, Komjathy, and Go Leasing, the various petitioners were represented by the selfsame attorney who represents the petitioner in this case. Persistence can be a virtue, but, to paraphrase Emerson, a foolish persistency is the hobgoblin of little minds. We agree with the FAA that Rochna's attorney remains "oblivious to the obvious." Rejecting an appeal which can never fly, we affirm the decision of the NTSB.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1919

STEPHEN J. ROCHNA
Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD
AND JAMES B. BUSEY, ADMINISTRATOR, FEDERAL
AVIATION ADMINISTRATION,
Respondents.

BEFORE

Breyer, Chief Judge,
Bownes, Senior Circuit Judge
and Selya, Circuit Judge

ORDER OF COURT

Entered: April 12, 1991

Upon consideration of petitioner's petition for rehearing,

It is ordered that said petition be denied.

By the Court:

/s/
Francis P. Scigliano
Clerk

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5 U.S.C. § 551(4) (1982)

For the purpose of this subchapter --

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include --

* * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

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5 U.S.C. § 552(a)(1) (1982)

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which

forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms there of, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal

Register.

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5 U.S.C. § 553 (1982)

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved --

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include --

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority

suance, amendment, or repeal of a rule.

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5 U.S.C. § 558 (1982)

Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

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5 U.S.C. § 706 (1982)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency ac-

tion. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the

extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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49 U.S.C. app. § 1429(a) (1982)

Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation [Administrator] may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation

[Administrator], he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation [Administrator] may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation [Administrator] shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation [Administrator] for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such cer-

under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply --

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except --

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the is-

tificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation [Administrator] under this section may appeal the Secretary of Transportation's [Administrator's] order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's [Administrator's] order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's [Administrator's] order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation [Administrator]. The filing of an appeal with the National Transportation Safety Board shall stay the effective-

ness of the Secretary of Transportation's [Administrator's] order unless the Secretary of Transportation [Administrator] advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation [Administrator]. The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this Appendix, and the Secretary of Transportation [Administrator] shall be made a party to such proceedings.

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49 U.S.C. app. § 1471 (1982)

Civil penalties; notice and hearing; compromise; liens

(a)(1) Any person who violates (A) any provision of subchapter III, IV, V, VI, VII, or XII of this chapter * * * or any rule, regulation, or order issued thereunder, * * * shall be subject to a civil penalty of not to exceed $1,000 for each such violation, * * * If such violation is a continuing one, each day of such violation shall constitute a separate offense. * * *

(2) Any civil penalty may be compromised by the Secretary of Transportation [Administrator] in the case of violations of subchapters III, V, VI, or XII of this chapter, or any rule, regulation, or order issued thereunder, * * *

Certificate action.

(a) Under section 609 of the Federal Aviation Act of 1958 (49 U.S.C. 1429), the Administrator may reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, and may re-examine any civil airman. Under section 501(e) of the FA Act, any Certificate of Aircraft Registration may be suspended or revoked by the Administrator for any cause that renders the aircraft ineligible for registration.

(b) If, as a result of such a reinspection, re-examination, or other investigation made by the Administrator under section 609 of the FA Act, the Administrator determines that the public interest and safety in air commerce requires it, the Administrator may issue an order amending, suspending, or revoking, all or part of any type certificate, production certificate,

airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. This authority may be exercised for remedial purposes in cases involving the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.) or regulations issued under that Act. This authority is also exercised by the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Regional Counsel concerned. If the Administrator finds that any aircraft registered under Part 47 of this chapter is ineligible for registration or if the holder of a Certificate of Aircraft Registration has refused or failed to submit AC Form 8050-73, as required by § 47.51 of this chapter, the Administrator issues an order suspending or revoking that certificate. This authority as to aircraft found ineligible for registration is also exercised

by the Aeronautical Center Counsel.

(c) Before issuing an order under paragraph (b) of this section, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) advises the certificate holder of the charges or other reasons upon which the Administrator bases the proposed action and, except in an emergency, allows the holder to answer any charges and to be heard as to why the certificate should not be amended, suspended, or revoked. The holder may, by checking the appropriate box on the form that is sent to the holder with the notice of proposed certificate action, elect to --

(1) Admit the charges and surrender his or her certificate;

(2) Answer the charges in writing;

(3) Request that an order be issued in

accordance with the notice of proposed certificate action so that the certificate holder may appeal to the National Transportation Safety Board, if the charges concerning a matter under Title VI of the FA Act;

(4) Request an opportunity to be heard in an informal conference with the FAA counsel; or

(5) Request a hearing in accordance with Subpart D of this part if the charges concern a matter under Title V of the FA Act.

Except as provided in § 13.35(b), unless the certificate holder returns the form and, where required, an answer or motion, with a postmark of not later than 15 days after the date of receipt of the notice, the order of the Administrator is issued as proposed. If the certificate holder has requested an informal conference with the FAA counsel and the charges concern a matter under Title V of the FA Act, the holder

may after that conference also request a formal hearing in writing with a postmark of not later than 10 days after the close of the conference. After considering any information submitted by the certificate holder, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) issues the order of the Administrator, except that if the holder has made a valid request for a formal hearing on a matter under Title V of the FA Act initially or after an informal conference, Subpart D of this part governs further proceedings.

(d) Any person whose certificate is affected by an order issued under this section may appeal to the National Transportation Safety Board. If the certificate holder files an appeal with the Board, the Administrator's order is stayed unless the

Administrator advises the Board that an emergency exists and safety in air commerce requires that the order become effective immediately. If the Board is so advised, the order remains effective and the Board shall finally dispose of the appeal within 60 days after the date of the advice. This paragraph does not apply to any person whose Certificate of Aircraft Registration is affected by an order issued under this section.
